order to calculate damages -- a determination involving the court in ratemaking. The court in Wegoland Ltd. v. NYNEX Corp., a fraud-related claim challenging the rates of several telephone companies, for example, held that a determination of damages would entwine the court in a calculation of the reasonableness of those rates. The court "recognize[d] that plaintiffs are seeking an award of damages that does not explicitly ask the court to determine reasonable rates. However, like the Eighth Circuit, I believe that such an award would effectively require determining what a reasonable rate would have been."[38] Several other courts have come to similar

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[38] 806 F. Supp. 1112, 1121-22 (S.D.N.Y. 1992).

In affirming the lower court's decision, the Second Circuit agreed with this analysis. It said:

> The plaintiffs respond that courts would not be required to determine a "reasonable" rate, but rather would only have to decide what damages arose from the fraud, a task courts routinely undertake. However, the two are hopelessly intertwined: "The fact that the remedy sought can be characterized as damages for fraud does not negate the fact that the court would be determining the reasonableness of rates" and that "any attempt to determine what part of the rate previously deemed reasonable was a result of the fraudulent acts would require determining what rate would have been deemed reasonable absent the fraudulent acts, and then finding the difference between the two."

[Footnote continued on next page]

conclusions.[39] The determination (and retroactive setting) of a reasonable rate, however, would engage state law in exactly the type of CMRS rate regulation prohibited by Section 332(c)(3).

Moreover, the determination of a new "reasonable" rate would likely be a very involved and intrusive process. Calculating the "reasonable" rate absent rounding up is not merely a matter of dividing the per-minute charge by sixty. For example, if a carrier were forced to bill in per-second increments, the per-second rate, as the Commission seems itself to have acknowledged,[40] would rise to recover the lost revenue needed to cover the carrier's costs. Furthermore, each second would probably not be charged at the same rate. Rather, if forced to charge on a per-second basis, CMRS providers would likely charge a higher rate for the

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[Footnote continued from previous page]
Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 21 (2d Cir. 1994) (citations omitted).

39 See, e.g., H.J., Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 493-94 (8th Cir. 1992), cert. denied, 504 U.S. 957; Birnbaum v. Sprint Communications Corp., No. 96-CV-2514(ARR)(CLP), 1996 WL 897326, *5 (E.D.N.Y. Nov. 19, 1996) (attempt to enforce superseded tariff would require court "to make a determination that the Original Tariff constitutes a reasonable rate"); Hardy v. Claircom Communications Group, 937 P.2d 1128, 1132 (Wash. Ct. App. 1997) (plaintiffs' rounding up "allegations are such that a court would necessarily have to consider the reasonableness of the rates charged in order to resolve them on the merits").

40 See note 16, infra.

initial seconds, when a variety of initial, non-recurring costs are incurred, than for later seconds. This type of calculation is tantamount to rate-setting by the state, exactly the type of behavior prohibited by Section 332.[41]

2. Injunctive Relief Is Also Preempted

Similarly, an injunction attacking the CMRS providers pricing practices would also constitute rate regulation, as it would mandate either what services the CMRS provider could charge for or how much it could charge for such services.[42] As one court concluded in a challenge to a cellular carrier's billing for so-called

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[41] Moreover, such a claim should also be precluded because for the court to determine the reasonableness of a rate would intrude on the Commission's authority to, in the first instance, determine the reasonableness of a rate. See e.g., Bruss Co. v. Allnet Communications Servs., Inc., 606 F. Supp. 401, 408 (N.D. Ill. 1985) ("a dispute as to whether a carrier's rates or practices are reasonable has uniformly been deemed to be within the primary jurisdiction of the appropriate regulating agency"); Southwestern Bell Tel. Co. v. Allnet Communications Servs., Inc., 789 F. Supp. 302, 304 (E.D. Mo. 1992) ("Issues regarding the reasonableness of rates have been held by courts to be within the primary jurisdiction of the FCC."). See also Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 448, 27 S. Ct. 350, 358 (1907) (holding in ICC context that "a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission").

[42] An injunction against the practice would also in effect require a finding that the practice was unreasonable, a determination again left to the Commission. See note 41, supra.

"non-communications time" (including time charged in whole-minute increments), "[t]he request for such an injunction is nothing less than a request that the court regulate the manner in which [the cellular provider] calculates its rate schedules."[43]

For all of these reasons, the type of injunctive and monetary relief sought in Smilow and similar cases would involve states in the regulation of the rates charged by CMRS providers, intruding on the Commission's exclusive authority in this area, and violating Section 332(c)(3).[44]

3. Form of Action is Irrelevant

It is of no consequence if the state law claim challenging the CMRS provider's charges is labeled a claim for breach of contract, unfair trade practices, or the like -- rather than as a direct challenge to the rates themselves; nor does it matter whether the plaintiffs claim that they are challenging the disclosure of a rate policy, rather than the rates themselves. As the Supreme Court and other courts have

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[43] In re Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193, 1201 (E.D. Pa. 1996).

[44] As noted above, an award of damages would also intrude on the Commission's primary jurisdiction to determine the reasonableness of a rate.

indicated[45] the true targets of these claims are the rates charged themselves. If the Commission does not foreclose all such avenues for challenges to CMRS rates, it will simply be allowing plaintiffs to manipulate pleading devices to circumvent the Commission's exclusive authority over CMRS rates.[46]

Support for the position that Section 332 bars all of these types of state law suits can also be found in two rounding up cases addressing the issue and concluding that such suits are barred.[47] In one of these suits, plaintiffs alleged breach of contract, unfair and deceptive trade practice, breach of implied duty of good faith and fair dealing, and unjust

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[45] See discussion of Arkla and, e.g., Southern Union Co., supra notes 35-36 and accompanying text.

[46] For example, in a class action case pending in the Superior Court of New Jersey against Bell Atlantic NYNEX Mobile, a plaintiff is challenging the quality of the carrier's service on the grounds that it was inconsistent with customer expectations in light of marketing and other materials provided to the customers and that the carrier allegedly failed to disclose information relating to the quality of its service. See Complaint, Carroll v. Cellco Partnership (N.J. Super. Ct. Law Div. (Camden County) filed Nov. 20, 1996).

Further, several of the challenges to whole-minute charges have been cloaked as attacks not on the charge itself, but rather on the provider's alleged failure adequately to disclose that such a charge existed.

[47] See In re Comcast Telecomm. Litig., 949 F. Supp. 1193 (E.D. Pa. 1996); Hardy v. Claircom Communications Group, 937 P.2d 1128 (Wash. Ct. App. 1997).

enrichment, claiming that they were not challenging the rates charged themselves, but the company's alleged failure to disclose them.[48] The court, however, recognized that the "claims alleged by the [p]laintiffs present a direct challenge to the way in which [the cellular provider] actually calculates the length of a cellular phone call and the rates which are charged for such a call. Thus, any state regulation of these practices is explicitly preempted under the terms of the Act."[49]

A similar result was reached in Hardy v. Claircom

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[48] See In re Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193, 1199-1200 (E.D. Pa. 1996). The plaintiffs challenged the cellular provider's practice of rounding up and billing for connection time (i.e., the time between when a call is initiated and when two-way communication is established).

[49] Id. at 1201. The court later said: "In this case, [p]laintiffs have made a series of state law and common law allegations against Comcast. While none of these claims pose an explicit challenge to the rates charged by Comcast for cellular phone service, a careful reading of the complaint and the remedies sought by the [p]laintiffs demonstrates that the true gravamen of the complaint is a challenge to Comcast's rates and billing practices." Id. at 1203. It added: "Furthermore, under the language of Section 332, the only potential avenues for resolving a challenge to the rates charged by a CMRS provider are a complaint filed with the FCC or a suit filed in federal court. All state regulation of the rates charged by CMRS providers is explicitly preempted by the language of the Act. See 47 U.S.C.A. § 332." Id. at 1203-04.

Communications Group,[50] which alleged that two air-to-ground wireless carriers failed to inform customers of their rounding up practices in promotional material. The court specifically addressed Section 332(c)(3) and said that the plaintiff's "claims implicate not only the advertising practices of [the CMRS provider] but also the reasonableness of the carrier charging the tariff rate in light of those practices."[51] The court thus concluded that "[the] claims are therefore covered by the Act and are preempted."[52]

These cases make clear that no matter the form of the challenge, any effort based on state law attacking CMRS rate-charging structures and asking for monetary relief or an injunction against the practice would result in state regulation of CMRS rates, contrary to Section 332(c)(3) of the Communications Act.

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[50] 937 P.2d 1128 (Wash. Ct. App. 1997).

[51] Hardy, 937 P.2d at 1133.

[52] Hardy, 937 P.2d at 1133. The court said that the plaintiffs' "allegations are such that a court would necessarily have to consider the reasonableness of the rates charged in order to resolve them on the merits. Even assuming [plaintiffs] could prevail on any of their claims, any court-imposed award of damages would by definition result in their paying something other than the filed rate." Id. at 1132.

4. State Suits Threaten the Uniform, Nationwide System of Regulation Intended by Section 332(c)(3)

Finally, the Commission should hold that state-law claims are barred under Section 332(c)(3) since disparate state regulation of CMRS charges frustrates the Congressional goal of creating a uniform regulatory structure for CMRS rates. As the House Report accompanying the bill creating Section 332(c)(3) states, the preemption provision was included in order "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines."[53]

This goal has been recognized by both the Commission and the courts. For example, the Commission has stated that "the legislative history of OBRA makes plain" that Congress' intention was for there to be "establish[ed] a national regulatory policy for CMRS, not a policy that is balkanized state-by-state."[54] A

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[53] H.R. Rep. No. 103-111, at 260 (1993).

[54] Report and Order, In re Petition of New York State Public Service Commission to Extend Rate Regulation, 10 FCC Rcd. 8187, ¶ 24 (1995). The Commission has also said that "by adopting Section 332(c)(3)(A) of the Act, [Congress] intended generally to preempt state and local rate and entry regulation of all commercial mobile radio services to ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest." Second Report and Order, In re Implementation of Sections 3(n) and 332 of the

[Footnote continued on next page]

federal district court also recognized that "Congress preempted any state or local regulation of the rates charged by CMRS providers, thereby avoiding the potential that a myriad of conflicting regulations issued by states and localities could thwart the comprehensive regulatory scheme embodied in the Communications Act."[55]

In a related context involving the Interstate Commerce Commission -- where certain authority was granted by Congress solely to the I.C.C., the Supreme Court said that:

> It would vitiate the overarching congressional intent of creating "an efficient and nationally integrated railroad system" to permit the State of Iowa to use the threat of damages to require a carrier to do exactly what the Commission is empowered to excuse. A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act.[56]

[Footnote continued from previous page] Communications Act; Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411, ¶ 250 (1994), reconsideration granted in part, 10 FCC Rcd. 7824 (1995), reconsideration denied, 11 FCC Rcd. 19729 (1996).

55 In re Comcast Telecomm. Litig., 949 F. Supp. 1193, 1204 (E.D. Pa. 1996).

56 Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 325-26, 101 S. Ct. 1124, 1134 (1981) (citation omitted).

The detrimental effects of these inconsistent state regulations are exacerbated by the realities of the marketplace. Many CMRS providers operate geographically separate systems in a number of states,[57] but can benefit from economies of scale by creating regional or national operational systems. Disparate state regulation would significantly raise these providers' operating costs by forcing them to create separate operational systems, such as for billing and switching, for each individual state.[58] A similar problem arises in those CMRS service areas which cover more than one state;[59] there, disparate state regulation

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[57] For example, SBMS operates numerous separate CMRS systems throughout various portions of the country, both within the seven states served by SBMS's local exchange carrier affiliates and outside of those in-region territories, including the metropolitan areas of Boston, Chicago and Washington/Baltimore, and throughout upstate New York. The customers in all of these systems are charged for incoming calls and in whole minute increments. These characteristics are not required to be, and as a result are not, tailored to individual state requirements.

[58] As the court in Comcast noted, "Virtually identical allegations to the ones contained in the complaint presently pending before this court were filed in state courts in Pennsylvania, Delaware and New Jersey creating the potential for three radically different determinations of Comcast's obligations to its customers regarding its rates and billing practices." In re Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193, 1204 (E.D. Pa. 1996).

[59] This situation, of course, exists throughout the country. As a local example, SBMS's Cellular One system in the Washington/Baltimore area encompasses 3 states

[Footnote continued on next page]

would necessitate multiple operational systems and rate plans for the same system -- not only increasing costs but potentially creating customer confusion over rates. Moreover, in such situations it may become impractical or impossible to follow different state regulations.

These problems will only get worse as CMRS carriers consolidate their operations into multistate units and PCS operators with large MTA operating areas become operational and gain market share. The addition of these disparate and burdensome regulatory costs to the provision of CMRS service will discourage the entry of new wireless providers and will also discourage or thwart the efficiency-producing and customer-service enhancing expansion of already existing CMRS providers across state borders.[60]

[Footnote continued from previous page]
and the District of Columbia, combining 2 MSA licenses and 4 RSA licenses into a single CMRS system within which all rates charged and all customer care and operational characteristics are the same for all customers. In other areas, SBMS operates systems where a single MSA covers multiple states (e.g., the Kansas City MSA includes both Kansas and Missouri and the St. Louis MSA covers both Missouri and Illinois). While there are some minor zone-based rate plans within these various systems, the rates charged by SBMS are not tailored to the individual states in which the customers reside or in which they may be traveling.

[60] State regulation -- and inconsistent regulation among the states -- may also constitute regulation of CMRS entry prohibited by Section 332(c)(3). The Commission itself has stated that regulation may constitute a barrier to entry. See Notice of Proposed
[Footnote continued on next page]

CONCLUSION

For the foregoing reasons, the Commission should grant this Petition.

Respectfully submitted,

Carol M. Tacker

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Counsel & Secretary
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November 12, 1997

[Footnote continued from previous page]
Rulemaking, In re Decreased Regulation of Certain Basic Telecommunications Services, 2 FCC Rcd. 645, ¶ 11 (1987) ("The presence of traditional regulation itself may be a significant entry barrier to a market that otherwise could operate efficiently on a highly competitive basis."). Furthermore, the D.C. Circuit has recognized that the burdens created by regulation may constitute a barrier to entry. See Southern Pacific Communications Co. v. American Tel. & Tel. Co., 740 F.2d 980, 1001 (D.C. Cir. 1984) ("the costs and delays of the regulatory process clearly constitute barriers to entry"), cert. denied, 470 U.S. 1005, 105 S. Ct. 1359 (1985). As noted above, conflicting state regulations regarding CMRS charges will make it more difficult and costly for CMRS providers to establish service -- thus making it more difficult for entry to occur. In fact, it may be difficult or impossible for a CMRS provider to even follow inconsistent state regulations. Thus, state court adjudications in this area constitute forbidden entry regulation under Section 332(c)(3).

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE
SECRETARY

Donald L. Pevsner, Esquire
7280 Southwest 134 Terrace
Miami, Florida 33156

Dear Mr. Pevsner:

This is in response to the petition for rulemaking you filed recently. The petition requested that the Commission adopt a rule requiring all interstate long-distance carriers to bill all customers on a per-second basis rather than on a per-minute or per-six second basis. It also asked the Commission to decide whether it is permissible for carriers to charge a higher rate for the first minute of connection time than is charged for additional minutes.

Because the rule changes you request appear unlikely to benefit consumers, we dismiss your petition for rulemaking without prejudice pursuant to section 1.401(e) of the Commission's Rules.[1]

We believe it is unlikely that the rule changes you seek will reduce consumer phone bills. If per-second billing were required, interstate long-distance carriers would almost certainly react by setting their per-second rates at a level designed to recover the revenues that were generated by the previous rates.[2] Because the revenues generated under the current billing practices are permissible, it is unlikely that

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[1] "Petitions which . . . plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner." 47 C.F.R § 1.401(e).

[2] Under the present system, carriers collect a certain level of revenue from calls terminating within a particular minute. For example, calls between 1 minute and 1 second, and 2 minutes would be charged as 2-minute calls and would produce a certain level of revenue. Assuming an even distribution of calls terminating in that minute, and assuming carriers were required to bill on a per-second basis, the total price for calls terminating in the first 30 seconds of any minute would likely decrease, while the total price of calls terminating in the last 30 seconds of any minute would increase.

the Commission would object to new rates designed to maintain the current level of revenues. For example, for AT&T, the Commission uses price cap regulation to ensure that rates for residential services are just and reasonable. Under price caps, AT&T's rates are generally deemed permissible so long as they fall within the upper and lower rate boundaries for each category of services -- one of which includes AT&T services for residential and small business customers. The absolute revenue level generated by AT&T's residential services is in compliance with the Commission's price cap rules. Thus, even if AT&T were to bill on a per-second basis, it would most likely adjust its rate structure to produce the same level of revenues. The new rates would still fall within the acceptable range under price cap regulation, and residential customers would not experience a decrease in their long-distance bills.

Moreover, the Commission has not generally undertaken the prescription of telephone industry billing procedures. Numerous providers compete for the long-distance business of both residential and business customers. The billing practices of carriers vary -- some already offer sub-minute or per-second billing options, while others offer bulk rate options under which call length is irrelevant. Thus, carriers compete in terms of their billing practices, and customers are free to select a carrier that offers the most desirable billing options. If the Commission were to mandate a particular billing procedure, it would eliminate this form of service competition.

We conclude that the public interest is better served by our continuing to devote our limited resources to proceedings with a greater potential to produce substantial consumer benefits than the rulemaking you have requested.

Accordingly, we are returning your petition for rulemaking.

Sincerely,

Kathleen B. Levitz

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

Enclosure

B

-CELLULAR RADIO TELECOMMUNICATIONS SERVICE TARIFF-

VII. PRICE/PAYMENT (Continued)

not be excused from its payment obligations on the basis that fraudulent use occurred.

VIII. MINIMUM OBLIGATION OF RESELLER

CRS will be provided to Reseller by Company in increments of twenty-five (25) Access Numbers. Reseller will, regardless of actual usage, pay monthly access charges and minimum Airtime Usage charges per Access Number, from the date subscribed to, as set forth in the Agreement. Additionally, Reseller shall agree to subscribe initially to each such set of Access Numbers for the minimum period set forth in the Agreement, which shall in no event be less than six (6) months.

IX. TIMING OF CALLS

A. Customer is charged for Airtime Usage both when calls are originated and when calls are received on mobile radio units being served by Company.

1. Chargeable time for calls originated by a cellular mobile radio unit begins when a connection is established if the called party answers, and ends when the cellular mobile radio unit disconnects. If called number does not answer, there generally is no charge.

2. Chargeable time for calls received by a cellular mobile radio unit begins when the call is answered by the cellular mobile radio unit, and ends when the cellular mobile radio unit disconnects.

AWACS, INC.
480 East Swedesford Road
Wayne, Pennsylvania 19087

-CELLULAR RADIO TELECOMMUNICATIONS SERVICE TARIFF-

IX. TIMING OF CALLS (Continued)

3. Incomplete calls originated by a mobile radio unit, up to no less than thirty (30) seconds, shall not be billed. Such incomplete calls may be billed if connection to the Cellular System is more than thirty (30) seconds in length.

B. Usage for each call is billed in one (1) minute increments, subject to a minimum charge equivalent to usage of one (1) minute. Calls ending in a fraction of one minute will be rounded up to a full minute for billing purposes.

C. When a connection is established in one rate period and ends in another, the rate in effect for each period applies to the portion of the connection occurring within each rate period. Calls for a duration of less than thirty (30) seconds in the originating rate period will be billed at the originating period rate for a thirty (30) second increment.

X. DEPOSITS & DELINQUENT CHARGES

A. Company may, in order to safeguard its interests, require an applicant or existing Customer to make a suitable deposit, to be held by it as a guarantee of the payment of charges, and/or request an advance payment. Various forms of financial guarantee such as, but not limited to, letters of credit will be considered when establishing deposit requirements. Upon discontinuance of CRS, the deposit will be credited to Customer's account and any credit balance will be refunded after all amounts due Company have been paid.

AWACS, INC.
480 East Swedesford Road
Wayne, Pennsylvania 19087

C

CELLULAR RADIO TELECOMMUNICATIONS SERVICE

3. RATES AND CHARGES (cont.)

3.1 Timing of Calls

A. Customers are charged for usage when they originate and when they receive calls on their mobile radio unit.

(1) Call timing for traffic originated by a Mobile Subscriber Unit starts when the call is answered by the called number and ends when the Mobile Subscriber Unit signals call disconnect to the MTSO.

(2) Call timing for traffic received by a Customer starts when the Mobile Subscriber Unit answers the call and ends when the Mobile Subscriber Unit signals call disconnect to the MTSO.

B. The minimum usage charge on each call is one minute except as provided for in the Dispatch Package. Each fraction of a minute is rounded up to the next full minute for billing purposes.

C. Calls which originate in one rate period and terminate in another will be billed at the rate in effect at call initiation for the first minute(or fraction thereof), and at the rate in effect for the duration of the connection for each additional minute thereafter.

3.2 Rate Periods of Usage

Applicable rates are based on the time of day and day of week as follows:

A. Peak Period

(1) 8AM-8PM Monday through Friday.

(2) The peak period for the following holidays is charged off peak period rates:

New Year's Day (January 1)
President's Day (3rd Monday in February)
Independence Day (July 4)
Labor Day
Thanksgiving Day
Christmas Day (December 25)

CERTIFICATE OF SERVICE

I, Patrick J. Grant, an attorney in the law firm of Arnold & Porter, hereby certify that on this 12th day of November 1997, copies of the foregoing Petition of Southwestern Bell Mobile Systems, Inc. For A Declaratory Ruling were delivered by hand to:

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